

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-5028/31

To be argued by
LONN A. TROST

United States Court of Appeals FOR THE SECOND CIRCUIT

In re
THE DUPLAN CORPORATION, DUPLAN FABRICS, INC.,
Debtors.

CHEMICAL BANK, THE FIRST NATIONAL BANK OF CHICAGO,
NORTH CAROLINA NATIONAL BANK AND SECURITY
PACIFIC NATIONAL BANK,
Appellants,

UNITED STATES TRUST COMPANY OF NEW YORK, Successor In-
denture Trustee for the 5½% Convertible Subordinated Debentures of
THE DUPLAN CORPORATION, due February 1, 1994,
Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED CLOTHING
WORKERS OF AMERICA, AFL-CIO,
Appellee,

ALFRED P. SLANER, AS REORGANIZATION TRUSTEE,
Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(76 B 1967-1968)

BRIEF OF APPELLEE, ALFRED P. SLANER, AS REORGANIZATION TRUSTEE OF THE DUPLAN CORPORATION AND DUPLAN FABRICS, INC., DEBTORS

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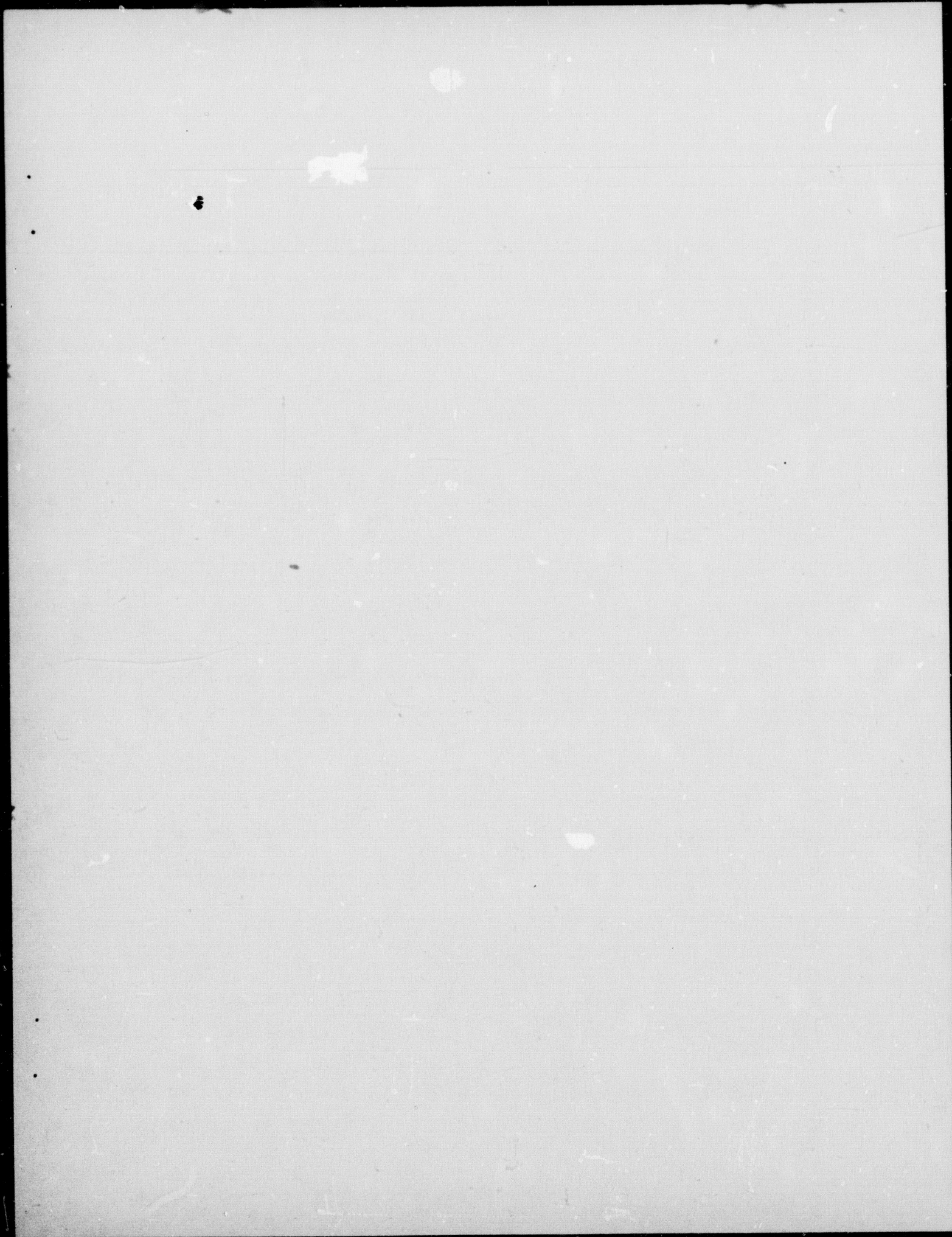


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5 1/2% SUBORDINATED DEBENTURES OF THE
DUPLAN CORPORATION, DUE FEBRUARY 1, 1994,

Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED
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Appellee,

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BRIEF OF APPELLEE ALFRED P. SLANER, AS
REORGANIZATION TRUSTEE OF THE DUPLAN
CORPORATION AND DUPLAN FABRICS, INC.,
DEBTORS

PRELIMINARY STATEMENT

This brief is submitted on behalf of appellee, Alfred P. Slane, as reorganization Trustee (the "Trustee") of The Duplan Corporation ("Duplan") and Duplan Fabrics, Inc., ("Fabrics") debtors, seeking the affirmance of the order of the Honorable Kevin T. Duffy, United States District Judge, dated October 5, 1977, entered on October 12, 1977 (the "Order"). The Order approved the terms of and authorized the execution of the Memorandum of Agreement (the "Agreement"), by and between The Rochester Joint Board Amalgamated Clothing Workers of America, AFL-CIO (the "Union") and the Rochester Button Company ("Rochester"), a division of Duplan. Joint Appendix, pgs. 65-85.*

ISSUE PRESENTED

Did the District Court abuse its discretion in approving the terms of the Agreement and authorizing its execution?

STATEMENT OF THE CASE

On August 31, 1976, Duplan and Fabrics filed petitions seeking an arrangement under the provisions of Chapter

* Reference to the Joint Appendix will henceforth be cited as "A" followed by the applicable page or pages.

XI of the Bankruptcy Act (the "Act"). 11 U.S.C. §§ 701-799. Thereafter, upon a motion of the Securities and Exchange Commission ("SEC"), the Chapter XI cases were transferred to Chapter X of the Act (11 U.S.C. §§ 501-676) pursuant to an order of the Honorable John J. Galgay, Bankruptcy Judge, dated October 5, 1976. Pursuant to an order of the District Court dated October 6, 1976, Alfred P. Slaner was appointed Trustee of Duplan and Fabrics. (A1, 3-4, 26). The Chapter X cases have not been referred to a Bankruptcy Judge and the District Court has reserved complete jurisdiction to make such orders as necessary in executing the powers conferred by Chapter X of the Act. (A4).*

The Agreement was executed by representatives of the Union and Rochester on June 9, 1977, subject to the approval of the District Court. (A85). The Agreement sets forth the terms of the renegotiation of two collective bargaining agreements which were to expire on May 31, 1977 (A27-28), covering certain employees working at three of Rochester's plants. Thereafter, by application dated June 30, 1977, the Trustee sought the entry of an order providing for the approval of the terms of the Agreement and authorizing its execution.

* Chapter X Rule 10-103 authorizes the District Court to either refer the case to a Bankruptcy Judge or to retain jurisdiction over the case for all purposes.

(A26-86). On September 27, 1977, a hearing (the "Hearing") was held, at which time the District Court considered the Trustee's application, all papers submitted and argument in support of and in opposition to the entry of the Order proposed by the Trustee. On October 5, 1977, the District Court signed the Order approving the terms of the Agreement and authorizing its execution. (A136-137). The Order was entered on October 12, 1977 and this appeal is taken from the Order.

STATEMENT OF THE FACTS

Factual Background to Dispute

Duplan is a diversified textile and apparel company which directly and indirectly, through its various subsidiaries and divisions, is or has been engaged in the manufacture and sale of double knit and warp knit fabrics, textured yarns, brassieres, buttons, children's sleepwear and ladies' underwear. Rochester is a division of Duplan with headquarters in Rochester, New York. Its operation includes the manufacture and sale of a variety of men's and ladies' buttons and the sale of machines which attach belt loops to jeans. (A26-27).

Over the past years, Rochester has been a party to numerous collective bargaining agreements with the Union (A27, 127) pursuant to which, among other things, Rochester has rec-

ognized the Union as the exclusive bargaining agent for its production and maintenance employees with reference to wages, hours and working conditions at its Akron, Rochester and Wellsville, New York plants (the "Plants"). (A27-28). The most recent collective bargaining agreements (one covering employees at the Akron plant (A34-47) and one covering employees at the Rochester and Wellsville plants (A48-64)) covered the period June 1, 1974 through June 1, 1977. (A27-28). Inasmuch as such collective bargaining agreements were to expire on May 31, 1977, the Trustee, his counsel, Rochester's management and the Union commenced negotiations with respect to the renewal of said agreements. (A28). The negotiations lasted for several months with "give and take" on both sides (A121, 133-134) and resulted in the execution of the Agreement. The Agreement amended the aforesaid agreements and effectively renewed same for the period June 1, 1977 through September 30, 1980. (A28). The amendments dealt with, inter alia, the following: (i) wage increases; (ii) cost of living adjustments, (iii) pension fund contributions; (iv) holiday pay; (v) vacation eligibility and (vi) severance pay (A28-30).

Submission of the
Trustee's Proposed Order
to the District Court

On June 30, 1977, the Trustee, upon his written application and the exhibits annexed thereto (A26-86), noticed,

for July 8, 1977, the settlement of a proposed order which provided for the approval of the terms of the Agreement and the authorization of its execution. (A22-25). In accordance with the provisions of Chapter X Rule 10-209(g), notice of the settlement of the proposed order was given by the Trustee to the SEC; Curtis, Mallet-Prevost, Colt & Mosle, attorneys for United States Trust Company of New York, Successor Indenture Trustee for the 5-1/2% Convertible Subordinated Debentures of Duplan due February 1, 1994 (the "Indenture Trustee"), one of the appellants herein; Zalkin, Rodin & Goodman, attorneys for Chemical Bank, The First National Bank of Chicago, North Carolina National Bank and Security Pacific National Bank (the "Bank Lenders"),* the other appellants herein and to all parties who had appeared in the reorganization proceedings by filing the statements required under the provisions of Chapter X Rule 10-210 and 10-211. (A22-23, 31).**

At the request of both the Bank Lenders and the Indenture Trustee, the July 8, 1977 settlement was adjourned sine die. On July 13, 1977, a proposed counter-order was submitted to the District Court based upon the affidavit of

* The Bank Lenders have alleged a secured status, which allegation is currently the subject of another proceeding involving the Bank Lenders and the Trustee.

** The Trustee had no obligation to give notice of his application for approval of the Agreement. Chapter X Rule 10-209; see pp. 17-22, infra.

Malcolm J. Hood, the Vice President of the Indenture Trustee. (A87-94). The proposed counter-order provided for (i) the approval of all of the terms of the Agreement with the exception of Article XV D* thereof and (ii) the rejection of Article XV D. The Indenture Trustee contended that Article XV creates an onerous and burdensome obligation and asserted that, "[p]ursuant to the authority granted under Section 116(1) of the ... Act permitting the [District] [C]ourt to reject executory contracts of the debtor, Article XV D of the ... Agreement must be rejected." (A91). The Trustee was unable to resolve the Article XV D controversy and accordingly, proposed that a substitute order be entered by the District Court. (A95-96). The substitute order, which was signed by Judge Duffy on September 2, 1977** (A99-100), authorized the Trustee to comply with all of the terms of the Agreement, with the exception of Article XV D, "subject to a hearing on the Agreement," which hearing was scheduled for September 27, 1977. (A100). Notice of the Hearing was given to the Bank Lenders, the Indenture Trustee, the SEC and to all other parties who were given notice of the Trustee's proposed order which was annexed to his June 30, 1977 application.

* Article XV D is referred to as the "Severance Pay Provision" in the Indenture Trustee's brief and as the "Article" in the Bank Lenders' brief.

** The substitute order permitted the employees to obtain their wage increases as well as other benefits provided for in the Agreement pending the Hearing before the District Court.

Article XV D of the Agreement

The Agreement restates without change Articles XV A, B and C of the prior collective bargaining agreements which deal with the relocation of the Plants, the importation of foreign products and the liquidation of operations at the Plants. (A39, 53, 73-4). Article XV D, which is the subject of this appeal, is not new to collective bargaining agreements between Rochester and the Union. (A121). Article XV D of the Agreement combines the provisions of Article XV D of the Akron collective bargaining agreement with Article XV D of the Rochester-Wellsville collective bargaining agreement:

(a) The Rochester-Wellsville Provision

"D. In the event that operations of the Employer are liquidated at the Rochester or Wellsville, New York plants during the term of this Agreement, then and in that event the Employer agrees to pay each employee separated as a result of such liquidation, a sum equal to the amount he would have been paid had he not been so separated, said sum to be computed on the basis of an average work week of forty (40) hours for the remainder of the contract period." (A53).

(b) The Akron Provision

"D. In the event that operations in the Employer's Akron, New York plant are liquidated during the term of this Agreement, for economic reasons resulting from the decline of casein and/or through products, the Employer covenants and agrees to offer all permanent employees of the Employer employed

at its Akron plant immediate employment in the Employer's Rochester or Wellsville plants. Should any permanent employee of the Employer employed at Employer's Akron plant elect not to transfer to the Employer's Rochester or Wellsville plants as provided for herein, then and in that event the Employer agrees to pay severance pay to any such employee, the amount of such severance pay to be negotiated and mutually agreed upon between the Employer and the Union. In the event that the Employer and the Union are unable to mutually agree upon the amount of severance pay to be paid to such employees, then and in that event the amount of severance pay shall be determined by the arbitrator named in Article XIX of this Agreement and the determination of the arbitrator shall be final and binding." (A39).

(c) Article XV D of the Agreement

"D. In the event that operations of the employer are liquidated at the Rochester, Wellsville or Akron, New York plants during the term of this agreement, the following provisions shall apply:

1. If the operations of the employer are liquidated prior to February 1, 1979 then and in that event, the employer agrees to pay each employee separated as the result of such liquidation, a sum equal to the amount he would have been paid had he not been so separated, said sum to be computed on the basis of an average work week of forty (40) hours for the remainder of the contract period.

2. If liquidation occurs on or after February 1, 1979, the parties shall negotiate the amount of severance pay due each employee. In the event that the Employer and the Union are unable to mutually agree upon the amount of severance pay to be paid to such employees, then and in that event the amount of severance pay shall be determined by the arbi-

trator selected from a panel proposed by the American Arbitration Association in accordance with the Association's rules and procedures and the determination of the Arbitrator shall be final and binding. In establishing the amount of severance pay due each employee, the Arbitrator shall consider the age and length of service of each employee and the employer's above stated intention not to liquidate its Rochester, Wellsville and Akron, New York Facilities." (A74-5).

Article XV D 1 of the Agreement is identical to the Rochester-Wellsville provision ("R-W provision"), except that Article XV D 1 of the Agreement only applies to liquidations which occur prior to February 1, 1979. The R-W provision provided for the payment of severance pay occasioned by a liquidation at any time during the term of the agreement. The February 1, 1979 limitation was a direct result of the Trustee's negotiations and reflects the earliest date beyond which the Union was not requiring full severance pay through the expiration of the Agreement. (A133-134).

Article XV D 2 of the Agreement is identical to the Akron provision, except that (i) Rochester is no longer obligated to offer employees, dismissed on account of a liquidation, employment at either the Rochester or Wellsville plant, (ii) the arbitrator will be selected by the parties in accordance with American Arbitration Association rules and (iii)

the arbitrator (some of whose guidelines had been established) will be selected only if liquidation occurs on or after February 1, 1979.

Article XV D of the Agreement is, in all relevant aspects, a combination of the provisions of the two prior collective bargaining agreements and the District Court's characterization of said Article XV D as an "evergreen provision" or a "carryover provision" (A140) is absolutely correct.

The Hearing

The Trustee's application, which fully set forth the nature of the Agreement, had annexed thereto copies of the renegotiated collective bargaining agreements, as well as the Agreement itself. (A26-86). Also annexed as an exhibit to the application was a summary of Rochester's operations for the fiscal years 1971 through 1976. (A33). The Trustee informed the District Court that Rochester, since its acquisition by Duplan in 1968, had shown a consistent growth pattern even though for the eight months ended May 29, 1977, Rochester earned, before corporate charges, only approximately \$731,000 on sales of about \$11.5 million. (A27). The Trustee further informed the District Court that the negotiations which led to the formulation of the Agreement were detailed; that consideration was given to the terms of collec-

tive bargaining agreements reached between the Union and other employers and that the Agreement represents, in the Trustee's opinion, a fair and reasonable settlement of the negotiations between Rochester and the Union. (A30-31). In his application, the Trustee also analyzed certain key provisions of the Agreement, including the renegotiated Article XV D. (A28-30). The arms length and good faith bargaining between Rochester and the Union and their representatives has never been questioned (A124, 126-7, 140) nor has it been contended that the Agreement, excluding Article XV D, is not beneficial to the estate.

At the Hearing, all interested parties were given an opportunity to present their views* to the District Court and all views, as well as affidavits and exhibits in support of or in opposition to the entry of the Order were considered by the District Court. The following points, among others, were brought to the specific attention of the District Court at the Hearing:

- (a) "I would like to focus your attention, if you will, on the numbers." (A122).
- (b) "... the damages arising out of that

* Judge Duffy heard all parties present at the hearing, i.e., the Union (A120-121), the Bank Lenders (A122-125), the Indenture Trustee (A126-127), the Trustee (A127-128) and the SEC (A128-129).

termination [under Article XV D] are administrative expenses...." (A123).*

The Bank Lenders, in their affidavit handed up at the commencement of the Hearing, as well as in their oral argument, specifically pointed out to the District Court that, in the event of a liquidation, Article XV D could result in a claim of up to \$6.4 million, depending upon the time a liquidation might occur (A103, 118, 132) and further urged that Duplan could not assume such a financial burden. (A91, 104-105). The District Court fully recognized the "potential" impact a liquidation might have on the estate. (A132).

(c) "Your Honor, I direct your attention respectfully to the last report submitted by the trustee of operations [of Rochester] for the 10 month period ending July 31, 1977." (A123).

The report showed a profit for the ten-month period ended July 31, 1977 of \$141,000 on sales of about \$10 million. (A104, 108-117). Admittedly, a "declining" profit, but the Trustee believed that the retention of new (actually prior) management (Messrs. Rosenthal and Marx), which retention also formed a part of the Hearing, would halt the "decline" in profits. (A18, 120, 123).

* The Trustee does not take a position as to the priority of any claims which may arise in the future.

(d) "Last, your Honor, the original intent of this clause as has been explained to us is that it has been a runaway shop clause ..." (A125).

The Bank Lenders and the Indenture Trustee have insisted that Article XV D was never intended to provide Rochester's employees with protection against a liquidation but rather protection from removal of work from Rochester to another area of the country. Thus, in the conclusionary affidavit of James Glass, Esq., submitted on behalf of the Bank Lenders, it is stated:

"I have been advised that the original reason for the inclusion of the provision for severance pay upon liquidation...was the Union's fear that Rochester would relocate out of the Rochester, New York area, rather than discontinuance of its business for financial reasons, a 'runaway shop [clause].'" (A105).

Such contentions were denied by the Union (A121) and are not supported by the record. (A133). In fact, a "runaway snop" provision had been expressly provided for in Article XV A of the prior collective bargaining agreements, as well as the Agreement:

"During the term of this Agreement the Employer agrees that it shall not, without the consent of the Union, remove or cause to be removed its present plant or plants from the city or cities in which such plant or plants are located." (A39; 53; 74-5).

Whereas, Article XV D provides for and deals with, as did the

collective bargaining agreements which it is succeeding, liquidation of the Plants.

Neither the Bank Lenders nor the Indenture Trustee, prior to or during the Hearing, requested that testimony be taken with respect to the intent of Article XV D. It was only after the District Court's request for final comments from the SEC on the approval of the Agreement that such request was made. The SEC stated:

"Your Honor, the position of the Securities and Exchange Commission is that we have no objection to the application as it is submitted, and we would only like to note that we have reviewed the application and it is our feeling that the trustee is both obligated and authorized under the sections of the bankruptcy act [sic], particularly section 189, to conduct the operation of the business and manage the property of the debtor, and we feel that in that context, while [Article XV D] may be subject to controversy, it is an agreement which has been worked out at arm's length and is one which is appropriately within the domain of the trustee.

THE COURT: It is absolutely astounding to me that the SEC would agree with me,...."
(A128-29). Emphasis added.

With the District Court, having voiced its decision, the Bank Lenders immediately requested that testimony be taken from a union representative in order to show that Article XV D was not intended to be a liquidation provision but rather, was intended to prevent a "runaway shop." (A129-130, 132). No such

representative was present at the Hearing. The District Court granted the Trustee's application and the Order from which this appeal was taken was signed subsequently thereto.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN APPROVING THE AGREEMENT AND AUTHORIZING ITS EXECUTION

The Indenture Trustee in its brief states that neither this Court nor any other Circuit Court has decided the precise issue raised on this appeal, which this Court is called upon to determine. (Indenture Trustee's Brief at pp. 11, 19*). However, the Indenture Trustee, as well as the Bank Lenders in their brief**, cite abundant, if not pertinent, authority in support of generally accepted principles

* Reference to the Indenture Trustee's Brief will henceforth be cited as "Ind. Tr. Br." followed by the applicable page or pages.

** Reference to the Bank Lenders' Brief will be cited as "B.L. Br." followed by the applicable page or pages.

of law.* Generally, the facts of the cases cited throughout the briefs of the Bank Lenders and the Indenture Trustee bear no reasonable relation to the instant case. Therefore, a seriatim discussion of each case will not be presented herein. The issue before this Court is whether the District Court committed error or abused its discretion in approving the Agreement and authorizing its execution on the basis of the record before the District Court.

Section 189 Of The Act Authorized The Trustee To Enter Into The Agreement As An Incident To The Operations Of Rochester's Business, Without Any Hearing

A Chapter X case is commenced for the purpose of

* Thus, this Court is informed that Section 206 of the Act (11 U.S.C. § 606) gives creditors "the right to be heard" (B.L. Br. 8; Ind. Tr. Br. 18); that, as of this date, the Trustee has not submitted the report of his investigation of the debtor's property pursuant to Section 167(5) of the Act (11 U.S.C. § 567(5); Chapter X Rule 10-208(a)(7)) (B.L. Br. 10); that in reaching a decision, the District Court must exercise an "informed independent judgment" (B.L. Br. 11); that the District Court may permit rejection of an onerous and burdensome executory contract (§ 116(1) of the Act, 11 U.S.C. § 516(1), Chapter X Rule 10-606) (B.L. Br. 12; Ind. Tr. Br. 20); that the Court usually cannot permit rejection of a contract which the Court authorized a Trustee to execute (Ind. Tr. Br. 21); that the District Court may exercise summary jurisdiction and must afford due process of law to the parties involved in such proceedings. (Ind. Tr. Br. 12-14); and that a reorganization Court is a Court of equity. (Ind. Tr. Br. 16).

rehabilitating a corporation. A goal which is not achieved overnight and a goal which envisions the management of the operations of the debtor's business by an impartial trustee. Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 422-3 (1972); Wertime, Inc. v. Turchick, 358 F.2d 802 (2d Cir. 1966), In Re Delta Food Processing Corporation, 446 F.2d 437, 438 (5th Cir. 1971). The foregoing was aptly stated by this Court in Wertime, Inc. v. Turchick, 358 F.2d at 806, as follows:

"The major long-run goal of a Chapter X reorganization is the economic rehabilitation of a particular corporate debtor so that it may continue to operate, thereby preserving at least in part the interests of creditors both secured and unsecured and, if possible, the interests of the stockholders. The finality of ordinary bankruptcy, with the attendant loss of values through forced sales, is in this way avoided."

Section 189 of the Act (11 U.S.C. § 589) and Chapter X Rule 10-207 grant to the District Court the power to authorize a reorganization Trustee to conduct the business and manage the debtor's property for such time and on such conditions as may be in the estate's best interest. 6 Collier on Bankruptcy § 8.12, p. 1420 (14th Ed. 1977). On October 6, 1976, the Trustee was appointed and authorized to operate Duplan's and Fabrics' businesses and to manage their properties. (A26). One of the Trustee's responsibilities is to keep a labor crew at work

and to fix the terms of their employment. In Re Public Ledger, 161 F.2d 762, 766 (3rd Cir. 1947). Concededly, the Trustee was obligated to negotiate in good faith with the Union in regard to the collective bargaining agreements. Carpenters Local Union No. 2746 v. Turney Wood Products, Inc., 289 F. Supp. 143, 149 (W.D. Ark. 1968). Inasmuch as the collective bargaining agreements were to expire on May 31, 1977, Rochester and the Union entered into negotiations which led to the execution of the Agreement on June 9, 1977, subject to the approval of the District Court. (A28, 85).

The Indenture Trustee and the Bank Lenders do not contend that the Trustee was not obligated to negotiate with the Union or that the bargaining was not conducted in good faith. Rather, it is asserted that Section 189 of the Act does not grant the Trustee authority to enter into a "modified collective bargaining agreement that binds the debtor beyond the reorganization proceedings as the Agreement may do", without first obtaining Court approval. (Ind. Tr. Br. 20-21). Clearly, the authorities do not support such contention. Thus, Collier in commenting upon the scope of the power conferred by Section 189 of the Act states:

"A question has been raised whether as an incident to the power to hire, the trustee or debtor in possession with express judicial sanction may enter into a collective bargaining agreement.... If the trustee can hire an

individual, he can surely hire him through that individual's agent [the Union]. Perhaps as a practical matter the court's prior approval of a collective bargaining agreement would be desirable, but it seems not to be a prerequisite. (6 Collier on Bankruptcy § 8.14, pp. 1431-1432 (14th Ed. 1977)). Emphasis added.

The sparse judicial authority on the subject is found in the decision of this Court in In Re Wil-Low Cafeterias, Inc., 111 F.2d 429 (2d Cir. 1940).^{*} In Wil-Low, a referee in bankruptcy disallowed an employee's claim for one week's vacation pay^{**} which was asserted against an estate in bankruptcy because the bargaining agreement, under which the claim arose, was entered into by the debtor-in-possession without a hearing or court approval.^{***} It should be noted that the decision does not indicate whether the previous bargaining agreement contained a similar provision. In concluding that court approval was not required "to make the simple and usual contracts of hiring necessary to the authorized conduct of the business...." (111 F.2d 431),

^{*} Accord: In Re Capital Foundry Corporation, 61 F. Supp. 332 (E.D.N.Y. 1945).

^{**} The case was a test case, as similar claims were expected from 200 other employees. 111 F.2d at 430.

^{***} An order of liquidation was entered just four weeks after the bargaining agreement was entered into by the debtor-in-possession. In Re Wil-Low Cafeterias, Inc., 71 F. Supp. 685, 687 (S.D.N.Y. 1939).

this Court stated:

"In these days of collective bargaining between labor unions and corporations it would seem strange that the contract which had been arrived at by negotiation, usual in form and substance and relating to ordinary wage arrangements should be held unauthorized because it contained a provision for one week's vacation to all employees who had been with the firm more than a year before it was entered into." (111 F.2d at pp. 431-32).

As the Trustee could have entered into the Agreement without a hearing, it is submitted that the District Court did not commit error in approving the Agreement and authorizing its execution on the basis of the record before it. During a subsequent hearing concerning another matter, the Indenture Trustee requested that the District Court reconsider its decision. The Court succinctly stated the basis for its holding as follows:*

"I believe that I said the last time that there was no indication whatsoever from anyone that the union contracts were not negotiated in good faith; that some of the provisions were carryover provisions, were, as they say in labor law 'ever green provisions'; that the severance pay [provision] was similar to an 'ever green provision,' and that under the circumstances I would not change the provision or the contract.

* The District Court in effect made the same statement at the Hearing by adopting the statement of the SEC, as set forth at p. 15 hereof. (A128-129).

"I believe I said that I thought that the trustee was acting properly, and under the circumstances I see no reason for a[nother] hearing with testimony and a record to be made in this situation." (A140-141).

The Trustee in negotiating the Agreement utilized his best judgment under the existing circumstances (A128) and, subject to approval by the District Court, authorized the execution of the Agreement. (A30-31). The action of the Trustee, as approved by the District Court, must stand. In Re Maine Street Raceways, 105 F. Supp. 620, 630 (D. Me. 1952); In Re Penn Central Transportation Company, 370 F. Supp. 486, 487 (E.D. Pa. 1974).

The Appellants Were Given
An Opportunity To Be Heard

Chapter X Rule 10-209(b) requires 20 days notice to creditors and an indenture trustee with respect to hearings being held to consider, among other things, the approval of a proposed compromise or settlement of a controversy, a proposed sale of the debtor's property, other than in the normal course of business or a hearing on allowances of compensation. Chapter X Rule 10-606 requires that notice of a hearing with respect to the rejection of an executory contract be given only to the parties to the contract. Neither the Act nor the Chapter X Rules requires that a hearing be held in connection with a trustee's application for Court approval of

the terms of a collective bargaining agreement. Accordingly, the cases cited by the Bank Lenders, such as In re Tilco, Inc., 558 F.2d 1369 (10th Cir. 1977)--Rejection of a contract; Wolf v. Nazareth Enterprises, Inc. 303 F.2d 152 (2d Cir. 1962)--Approval of a settlement and compromise (B.L. Br. 8), and cases cited by the Indenture Trustee, such as In Re American Trust, 426 F.2d 1059 (7th Cir. 1970)--Rejection of an executory contract; (Ind. Tr. Br. 16), are not in point or dispositive of the issue presented to this Court. Moreover, neither the facts nor the issues presented in such cases, as well as in other cases cited by Appellants, bear any reasonable relation to the present issue.

The Trustee, however, in the spirit of cooperation (which reflects the manner in which the proceedings have been conducted to date and which is essential for a successful reorganization) and recognizing the importance of the Agreement, the practicability of obtaining the District Court's approval thereof and desirous of keeping all interested parties informed, provided that the Agreement, prior to its becoming effective, must be approved by the District Court. (A85). Having obtained such approval, the Indenture Trustee and the Bank Lenders have asserted that the hearing which was afforded to them was inadequate. In particular, the Indenture Trustee and the Bank Lenders, among other things, boldly assert that (i) the District Court denied them an opportunity to be heard (B.L. Br.

8; Ind. Tr. Br. 18) "by refusing to take testimony regarding [Article XV D]" (Ind. Tr. Br. 4); (ii) the District Court made no attempt to reach "minimum hearing standards" required to satisfy due process (Ind. Tr. Br. 14) and (iii) the "ground rules established" by the District Court prevented a meaningful inquiry into the questions presented. (B.L. Br. 2, 11). The Indenture Trustee discusses at great length the nature of the summary jurisdiction of the District Court and its "right to be heard" (Ind. Tr. Br. 12-19) in an attempt to convince this Court that it, as well as the Bank Lenders (B.L. Br. 8), were denied due process of law. There is no basis in the record for such an argument. The Trustee does not contest the right and/or standing of the Bank Lenders and the Indenture Trustee to be heard and to bring facts before the District Court which are relevant to an application being considered by the Court. Such right and standing was recognized and all parties had more than a sufficient and ample opportunity to be heard and make their positions known. The Indenture Trustee and the Bank Lenders confuse a deprivation of due process with a ruling adverse to their contentions.

As shown at pages 11-16 hereof, the District Court was fully advised of all matters relevant to the question of the approval of the Agreement. There is absolutely no merit to the contention of the Indenture Trustee and Bank Lenders that they were denied an opportunity to be heard. Immediate-

ly upon the commencement of the Hearing, the District Court stated it was "really interested in" (A120) the question of the approval of the Agreement. At that time, the Trustee's application and exhibits in support thereof and the Indenture Trustee's affidavit and exhibits in opposition thereto had already been before the District Court for over two months. The Indenture Trustee was well aware of the potential impact of Article XV D and had objected to its inclusion in the Agreement as early as July 13, 1977. (A87-94). On the date of the Hearing, the Bank Lenders first presented their affidavit in opposition to the Agreement. (A122). Despite their and the Indenture Trustee's distaste of Article XV D (A91-93) and assertedly aware that testimony as to the alleged purpose and intent of Article XV D was available (A105), the Appellants decided not to conduct discovery, not to request the attendance of witnesses, not to request the production of documentary evidence and not to produce their own witnesses but, rather, the Appellants determined to sit by doing nothing, voicing their objections at the Hearing. During the nearly three month period prior to the Hearing, neither the Bank Lenders nor the Indenture Trustee subpoenaed any witnesses nor did they request the appearance of any particular persons at the Hearing. Chapter X Rule 10-213 provides:

"(a) ... On application of any party in interest, the court may order the examination of any person.

* * *

"(c) Scope of Examination. The examination under this rule or Rule 10-212(b) may relate to acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the case or to the formulation of a plan."

Further, Chapter X Rule 10-901 provides, inter alia, that Bankruptcy Rule 916 is applicable in the instant proceeding. Bankruptcy Rule 916 states that Rule 45 of the Federal Rules of Civil Procedure, which pertains to, among other things, subpoena power and the attendance of witnesses at hearings, is applicable in bankruptcy cases and, accordingly, pursuant to Chapter X Rule 10-901 was an appropriate means pursuant to which the Indenture Trustee and the Bank Lenders could have procured the attendance of witnesses at the Hearing; assuming, of course, a formal or informal request to the Trustee for the production of a witness or witnesses would have been refused (no such request was ever made).

Neither the Indenture Trustee nor the Bank Lenders took advantage of the rights afforded them. Apparently, both were content to have the matter determined by the District Court upon the record placed before it 88 days earlier. As noted, supra, at p. 15, and for reasons readily apparent, the first request by either the Indenture Trustee or the Bank Lenders for testimony from a union representative with re-

spect to the purpose and intent of Article XV D came subsequent to final comments by the SEC and after the District Court had indicated its approval of the Agreement. The record clearly shows and the District Court recognized that the Union has always had the benefit of a runaway shop clause (A39, 53, 74-75, 121; supra p. 14). The real dispute was with respect to the potential impact of Article XV D. The record again, however, clearly shows, that Article XV D does not represent a substantial modification of rights granted to the Union under previous bargaining agreements (A39, 53, 74-75, 121; supra pp. 8-11). Moreover, there was no indication that the Agreement was not negotiated in good faith.* It is submitted that upon the record before it, the District Court was fully justified in approving the Agreement and refusing to hear testimony of a speculative nature and, further, its refusal to hear such testimony does not constitute reversible error.

The Bank Lenders and Indenture Trustee had almost three months to prepare their positions and, if necessary, obtain witnesses by legal process or otherwise (pp. 24-26, supra). They elected not to do so. The record discloses a full hearing at which all facts pertinent to an informed and reasoned decision were presented to the District Court. (A135).

* "None of the appellants objected to the inclusion of substantial wage increases and other benefits contained in the Agreement." (Ind. Tr. Br. 11).

In support of their contention that the District Court denied them an opportunity to be heard, the Indenture Trustee, as well as the Bank Lenders, cite this Court's decision in In Re Long Island Properties, Inc., 125 F.2d 206, 207 (2d Cir. 1942), wherein this Court stated:

"... it is particularly important that the creditors ... should have an opportunity to be heard as to approval of the contract...." (Ind. Tr. Br. 16).

While the above quote supports the general statement that creditors should have an opportunity to be heard as to the approval of a proposed contract, the holding of the case is clearly adverse to the Appellants' contentions. Therein, Long Island Properties, Inc., a Chapter X debtor, owned property consisting of a tract of land on which four unfinished apartment buildings were located. The trustee negotiated a contract with one Harry Colen ("Colen") which provided for the completion of the buildings at a cost of \$75,000 to be paid from trustee's certificates. Upon notice to all interested persons, the Court entered an order allowing the trustee to issue \$76,000 in first lien certificates and to use up to \$75,000 in completing the building "upon such terms ... as shall be approved by the court." (125 F.2d at 207). Thereafter, a formal contract was prepared and an order approving said contract was noticed for hearing. There, unlike here, where all parties in interest were noticed, "[t]he notice ... was served on only a few of

the attorneys who had entered appearances in the reorganization proceedings." (125 F.2d at 207). Moreover, prior to the hearing on the proposed contract, Mast Corporation, a creditor of the debtor, submitted an offer to the trustee in the name of Country Life Apartments, Inc. ("Country Life") to complete the buildings for \$60,780 and, more importantly, "to propose through the Trustee a plan ... which would give the creditors 100 per cent of their claims...." (125 F.2d at 207). The Colen offer contemplated a plan whereby creditors would have received only 60 cents on the dollar and stockholders would not have received anything. At said hearing, several creditors filed affidavits in opposition to the Colen contract and "no creditor spoke in favor of it." Ibid. The Court reserved decision. A day later, however, upon receipt of a letter on Colen's behalf raising his offer to include provisions for a 100% plan, the Court, without a further hearing, approved the Colen contract, as amended. Numerous creditors and the owner of 50% of the debtor's stock appealed.

In reversing the decision of the District Court, this Circuit held that the creditors did not have an opportunity to be heard, stating:

"Notice of the hearing on October 21st did not specify that a contract for completion would be presented for approval it was served on only a fraction of the parties to be affected thereby ... No notice whatever was given of the amendments introduced by the letter of November 18th. Nor was the offer of Country Life Apartments ever for-

mally presented to the creditors and stockholders so that they could compare the two offers and express their preference between them. Such parties as had an opportunity to express their views were opposed to accepting the Colen contract, which everyone conceded was inferior to the other What prompted the judge to accept it does not expressly appear." (125 F.2d at 207).

The facts of the case are clearly distinguishable from the present case. Moreover, there, this Court concluded that "sound business judgment required acceptance of a better available offer." 125 F.2d at 208. Furthermore, the offer contemplated a proposed plan of reorganization which statutorily requires notice as well as extensive hearings. Chapter X Rule 10-303.

The Indenture Trustee asserts that the "District Court's failure to make findings of fact upon which it could base a decision, after substantial issues of fact was raised was error." (Ind. Tr. Br. 14). The proceeding before the District Court was not an adversary proceeding under Bankruptcy Rule 701. If considered as a motion pursuant to Bankruptcy Rule 914,* findings of fact are not required. Rule 914 specifically states that in all such contested matters "the following rules shall apply ... 752 ..." Bankruptcy Rule 752, "Findings By the court," specifically states in

* "In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."

part, that "... Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules ..."

Moreover, the record presents a clear understanding of the basis of the District Court's decision (A128-129, 135, 140-141) and therefore there was no need for the making of formal findings and conclusions. Woodruff v. Heiser, 150 F.2d 873, 875 (10th Cir. 1945).

The contention that the District Court could not properly evaluate the operations of Rochester or Duplan or predict the impact of Article XV D upon Duplan's reorganization because the Trustee has not yet filed a report (the "Report") pursuant to Section 167(5) of the Act (11 U.S.C. § 567(5))* (Ind. Tr. Br. 10; B.L. Br. 3, 10) is specious. The goal of Chapter X is rehabilitation. It is a long-term goal. The Report need not be filed, as the Indenture Trustee and the Bank Lenders would have this Court believe, prior to a trustee's assuming control of a debtor's operations and taking actions in furtherance thereof, but shall be filed at the earliest date practicable. Section 167(5) of the Act (11 U.S.C. 567(5)). To hold otherwise would effectively prohibit a debtor's operations within the confines of a Chapter X case.

* Chapter X Rule 10-208(a)(7) is the counterpart to § 167(5) of the Act.

POINT II

THE DISTRICT COURT HAD
NO DISCRETION TO REJECT
ARTICLE XV D

The Bank Lenders and Indenture Trustee base their appeal on the contention that Article XV D of the Agreement "is" onerous and burdensome,* and, therefore, the District Court's approval of the Agreement was an abuse of discretion. (B.L. Br. 2; Ind. Tr. Br. 4). The Bank Lenders and the Indenture Trustee are equating the Trustee's request for approval of the Agreement to a motion to reject an executory contract. The application before the District Court, however, was not and cannot be considered as a motion to reject the prior collective bargaining agreements. Section 116(1) of the Act (11 U.S.C. § 516(1); Chapter X Rule 10-606). The Trustee renegotiated certain prior collective bargaining agreements and the Hearing was held to approve the renegotiated agreements, i.e., the Agreement, not to reject an executory agreement. In any event, the argument is not sound. It is submitted that under the standards established by this Court, the Agreement is not "onerous and burdensome" so as to require or authorize its rejection.

* The Indenture Trustee has gone so far as to state that Article XV D, which applies only in the event of a liquidation, is an "open-ended provision." (Ind. Tr. Br. 22).

It is settled law that executory collective bargaining agreements may be rejected where such are onerous and burdensome. Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975); Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. REA Express, Inc., 523 F.2d 164 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975); In Re Alan Wood Steel Company, 3 Bankr. Ct. Dec. 926 (E.D. Pa. 1977). For rejection to be warranted, however, the entire contract must be burdensome and onerous and not one provision thereof. The Trustee may not "blow hot and cold." In Re Italian Cook Oil Corp., 190 F.2d 994, 997 (3d Cir. 1951); Accord: Thompson v. Texas Mexican R.R. Co., 328 U.S. 134, 141 (1946); In Re H.S. Systems, Inc., 3 Bankr. Ct. Dec. 1030, 1031 (S.D.N.Y. 1977); 8 Collier on Bankruptcy § 3.15[7], p. 205 (14th Ed. 1976).*

* The decision of Bankruptcy Judge Seidman in In Re Mingus, 3 Bankr. Ct. Dec. 1087 (D. Conn. 1977), does not alter the above rule of law. Mingus involved the selective rejection of lease covenants. Section 70(b) of the Act (11 U.S.C. § 110(b)), specifically provides that a trustee of a bankrupt estate may reject a lease or "any covenant therein." Under the standards set by this Circuit, rejection of a collective bargaining agreement cannot and should not be equated to rejection of a lease. Moreover, a close reading of that case indicates that the result achieved was the same as if it had been termed a rejection of the entire lease with the lessee retaining his leasehold estate as required by Section 70(b).

It was not an abuse of discretion for the District Court to approve and authorize the execution of the Agreement for at least two reasons. First, the Agreement on the whole is beneficial to the estate:

"Section 116(1) does not make mandatory the rejection of executory contract, but leaves the matter to the discretion of the court, without describing the circumstances warranting the exercise of the power conferred. The problem involved is one of assumption or rejection of burdens or liabilities in the light of consequent advantages of the estate. If a contract, even though it requires further performance or further duties, is on the whole beneficial to the debtor's estate, its rejection should ordinarily be denied." 6 Collier on Bankruptcy § 3.23[4] (14th Ed. 1977). Emphasis added.

The Indenture Trustee and the Bank Lenders do not object "to the inclusion of substantial wage increases and other benefits" as part of the Agreement (Ind. Tr. Br. 11). They do object to the inclusion of Article XV D. Bankruptcy Judge Ryan's statement in In Re Ira Haupt & Co., 289 F.Supp. 966, 972 (S.D.N.Y. 1968), that "Chemical may not have its cake and eat it, too" is particularly in point. The Agreement is beneficial to the estate since Rochester cannot operate without employees nor can it operate in the event of a strike. (A128). There is no authority in the law to carve out Article XV D while requiring the employees to continue to perform their part of the bargain.

Second, and more importantly, under the standards set by this Court for the rejection of executory collective bargaining agreements and upon the record herein, even if rejection of the Agreement was in question, it is not warranted. In Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., supra, this Court concluded that the Bankruptcy Court must carefully scrutinize applications to reject collective bargaining agreements and carefully balance the equities on both sides of the issues in light of the policy of the National Labor Relations Act. Thereafter, in Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. REA Express, Inc., supra, this Court stated that rejection should be authorized only where it appears that reorganization is not possible without such a rejection:

"... in view of the serious effects which rejection has on the carrier's employees it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." (523 F.2d at p. 172).

It should be noted that all the evidence establishes that the converse is true--here reorganization is possible only with the Agreement in effect. (A128).

Based upon the admonition in Kevin Steel, supra, this

Court remanded the REA case to the District Court for further consideration and findings on the issue of whether REA's bargaining agreements with two of its unions were sufficiently onerous and burdensome to warrant their rejection. On remand, REA Express, Inc. v. Brac, 92 LRRM 3244 (S.D.N.Y. 1976), the District Court, based upon the state of facts which existed at the time the motion to reject was heard by the Bankruptcy Judge (REA was adjudicated a bankrupt two months after this Court's decision to remand and prior to the District Court's subsequent decision*), allowed the rejection of only one of the two bargaining agreements. The evidence, as of the date of the initial hearing, showed that REA was in imminent danger of collapse and that there had to be an immediate reduction in expenses. Since wages and benefits under this collective bargaining agreement constituted REA's largest expense and, further, since the continuation of the bargaining agreement precluded the immediate implementation of an arrangement as proposed by REA, the District Court found rejection to be warranted. A second bargaining agreement could not be rejected because it did not have a devastating effect on the company and did not preclude an expeditious implementation of a plan.

* REA took immediate action when the District Court initially allowed it to reject its bargaining agreements: The result was a wildcat strike and a loss of revenues from which REA never recovered. REA Express, Inc. v. Brac, *supra*, 92 L.R.R.M. at 3249.

Here, approval of the Agreement and Article XV D thereof will neither result in the collapse of Rochester or preclude the development of a plan of reorganization. To the contrary, it will assist in the implementation of a plan by permitting an ongoing profitable operation to continue. Admittedly, Article XV D may never have any effect on the reorganization:

"...there is no way to predict whether a severance pay claim will become due during the reorganization proceedings or afterwards. There is also no way to predict the maximum amount of severance pay claims which could accrue after February 1, 1979." (I.T. Br. at p. 10).

Admittedly, in the abstract and in the event of a liquidation of Rochester, Article XV D is "onerous and burdensome". (A 128). However, it represents the best provision the Trustee was able to negotiate with the Union. (A128). There may never be a liquidation of Rochester. A Court may not speculate in determining whether rejection of a collective bargaining agreement is warranted. Rejection must be based on the state of facts as they exist at the time of the hearing, not on speculation. Thus, in REA Express, Inc. v. Brac, supra, 92 L.R.R.M. at 3246, the Court stated:

"It is now a matter of history that the debtor in possession's struggle to survive failed, and that REA was adjudicated a bankrupt on November 6, 1975. For present purposes, however, it is necessary to examine

the situation in light of the facts available when REA first sought permission to reject the union agreements. This was in early April, 1975, and most of the figures used were at March 28, 1975. The benefit of hindsight is not employed." (Emphasis added).

Neither the Trustee's, the Bank Lenders', nor the Indenture Trustee's desire to improve Duplan's financial outlook is sufficient reason to authorize the rejection of a collective bargaining agreement. Rejection will be authorized only if the failure to reject results in the collapse of the business or prevents a reorganization. Bohack Corp. v. Truck Drivers Local Union No. 807, etc., 431 F. Supp. 646, 650 (E.D. N.Y. 1977). The record discloses that approval of Article XV D will not cause the collapse of either Rochester or Duplan (A104, 108-117, 123, 132) nor will approval have any present effect on Rochester, absent a liquidation. Rejection of an executory collective bargaining agreement cannot be based upon a provision which has no present effect on the estate. See e.g., In Re Mammouth Mart, Inc., CCH Bankruptcy Cases § 66,648 (D. Mass. 1977).

The Indenture Trustee argues that the District Court abused its discretion in approving an agreement which leaves to arbitration the computation of the amount of severance pay which may become due to Rochester's employees in the event of a liquidation. (Ind. Tr. Br. 23). It is clear in this Circuit

that an agreement to arbitrate contained in a collective bargaining agreement is itself a contract creating rights and duties and that such an agreement will be enforced by the Bankruptcy Court, especially as here where certain guidelines have been established. Truck Drivers Local Union No. 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976); Schilling v. Canadian Foreign Steamship Co., Ltd., 190 F. Supp. 462 (S.D.N.Y. 1961).

Thus, in Bohack Corp. v. Truck Drivers Local Union No. 807, etc., supra, the Court concluded that an arbitrator may properly be called upon to determine the amount of damages suffered by employees upon the rejection of a collective bargaining agreement:

"The first three issues referred to the arbitrator, which involve the amount of damages suffered by the employees as a result of the rejections, are appropriate for arbitration ... The fact that working conditions or shop practices are not directly at issue does not mean the special expertise of the arbitrator is of no value."

* * *

"As pointed out earlier, questions of interpretation of the contract are for the arbitrator, not the courts. Indeed, by ordering arbitration, the bankruptcy judge implicitly acknowledged that the arbitrator possesses special expertise and competence in resolving labor grievances. There is no point to arbitration proceedings if a bankruptcy judge, lacking experience in the collective bargaining process, undertakes a plenary review of the arbi-

trator's decisions concerning areas where the arbitrator's knowledge and experience are far superior. Once an award is made, however, its status and priority are questions for the special expertise of the bankruptcy court, which may then relegate the claims of the union to a proper place in the framework of the re-organization." (431 F. Supp. at 654-5) (Emphasis added).*

Contrary to the contentions of the Indenture Trustee (Ind. Tr. Br. 23), it is recognized that an arbitrator is a proper person to determine the amount of damages caused by a rejection (or as here by a liquidation). The priority, if any, of an award is still a matter for determination by the Bankruptcy Court.

In Re Ira Haupt & Co., supra, cited to by the Indenture Trustee in support of the generally accepted proposition that the Bankruptcy Court in the exercise of its summary jurisdiction "'may not override the safeguards of undue celerity..." (Ind. Tr. Br. 18) is particularly illustrative of the reluctance of an appellate court to overturn findings by a lower court in cases of this nature. In that case, the Court concluded that on the basis of the record, Bankruptcy Judge Ryan's findings that Chemical Bank New York Trust Company had submitted itself to the summary jurisdiction of the

* The Court in Bohack Corp., supra, 541 F.2d at 320, concluded that Bankruptcy Rule 919(b) requires that permission of the Bankruptcy Court be obtained before any dispute be submitted to arbitration.

Court were not erroneous and could not be set aside. The Court stated:

"Findings of fact made by a Referee in Bankruptcy should not be set aside unless 'clearly erroneous'. [Citations omitted.]

"The Referee in such circumstances as these has available to him for the decisional process an informed appreciation of the proceedings and the background and context of the acts and declarations of the parties therein and of the transactions involved. Viewing the record as a whole the Court independently finds that there is no legal basis on which the order of the Referee should be disturbed; his findings are supported by evidence and the equities and moreover, they are not clearly erroneous and he correctly applied the law to the facts found." (289 F. Supp. at p. 972). (Emphasis added).

In the case at bar, the District Court had available to it an "informed appreciation" of the Duplan proceedings and its determination which was based upon an adequate record should not be set aside by this Court.

The record before this Court clearly supports the action taken by the District Court in approving the Agreement and authorizing its execution. Neither the Agreement's approval nor the District Court's refusal to allow additional time to present speculative testimony was clearly erroneous or an abuse of discretion. In Re Gibraltar Amusements, Ltd., 291 F.2d 22, 24 (2d Cir. 1961); Margolis v. Nazareth Fair

Grounds & Farmers Mkt., 249 F.2d 221, 223 (2d Cir. 1957). A reviewing court will not substitute its own judgment for the lower court's determination if the record reasonably supports such determination. In Re Ira Haupt & Co., supra, at 972; In Re Maine State Raceways, supra; In Re Calpa Products Company, 249 F. Supp. 71, 73 (E.D. Pa. 1965). This is especially so where the lower court, as here, is fully familiar with the proceedings before it and makes a judgment on various factors of which it has knowledge. In Re Paramount Merrick, Inc., 252 F.2d 482 (2d Cir. 1958); In Re Ira Haupt & Co., supra.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the District Court's order dated October 5, 1977 and entered on October 12, 1977 should be affirmed.

Dated: New York, New York
February 1, 1978

Respectfully submitted,

SHEA GOULD CLIMENKO & CASEY
Attorneys for the Trustee
330 Madison Avenue
New York, New York 10017
(212) 661-3200

Of Counsel:

Martin I. Shelton
Remy J. Ferrario
Lonn A. Trost

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of
THE DUPLAN CORPORATION
DUPLAN FABRICS, INC.,

Debtors.

:
:
DOCKET NO.
77-5028/31

CHEMICAL BANK, THE FIRST NATIONAL BANK
OF CHICAGO, NORTH CAROLINA NATIONAL
BANK, AND SECURITY PACIFIC NATIONAL BANK, :

Appellants, : AFFIDAVIT OF SERVICE
BY MAIL

UNITED STATES TRUST COMPANY OF NEW YORK,
SUCCESSOR INDENTURE TRUSTEE FOR THE
5 1/2% SUBORDINATED DEBENTURES OF THE
DUPLAN CORPORATION, DUE FEBRUARY 1, 1994

Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED
CLOTHING WORKERS OF AMERICA, AFL-CIO

Appellee,

ALFRED P. SLANER, AS REORGANIZATION
TRUSTEE OF THE DUPLAN CORPORATION,
AND DUPLAN FABRICS, INC., Debtors,

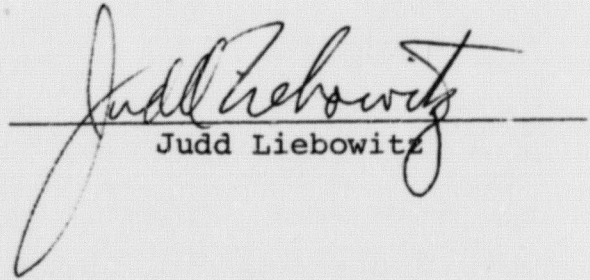
Appellee.

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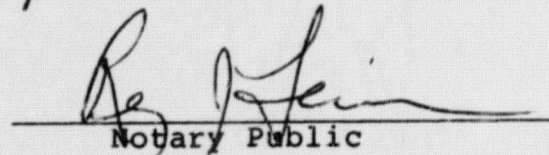
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Judd Liebowitz, being duly sworn, deposes and says:
that deponent is not a party to the action, is over 18 years of
age and resides at 3-53 27th Street, Fair Lawn, New Jersey.

That on the 1st day of February, 1978 deponent served the within Brief of Appellee, Alfred P. Slaner, as Trustee in Reorganization, upon Chamberlain, D'Amanda, Bauman, Chatman and Oppenheimer, at 1100 Cross Roads Building, 2 Main Street East, Rochester, New York, 146142, an Appellee herein, by depositing two true copies of same enclosed in a postpaid properly addressed wrapper in an official depository located in the building at 330 Madison Avenue, New York, New York 10017 under the exclusive care and custody of the United States Postal Service within the State of New York.


Judd Liebowitz

Sworn to before me this
1ST day of February, 1978.


Notary Public

REMY J. FERRADIO
Notary Public, State of New York
No. 31-4513267
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 1979
9

REMY J. FERRADIO
Notary Public, State of New York
No. 31-4513267
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 1979
9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHEMICAL BANK, et. al, and
UNITED STATES TRUST COMPANY OF
NEW YORK, SUCCESSOR INDENTURE
TRUSTEE

Appellants,

-against-

THE ROCHESTER JOINT BOARD
AMALGAMATED CLOTHING WORKERS OF
AMERICA, AFL-CIO and ALFRED P.
SLANER, AS REORGANIZATION TRUSTEE

Appellees.

AFFIDAVIT OF SERVICE

SHEA GOULD CLIMENKO & CASEY

330 MADISON AVENUE

NEW YORK, N. Y. 10017

(212) 661-3200

ATTORNEYS FOR

**APPELLEE, ALFRED P.
SLANER, AS
REORGANIZATION TRUSTEE**

(2) COPY RECEIVED
DATE 2/1/78 HOUR 10:15 AM
ZALKIN RODIN & GOODMAN
BY [Signature]
ATTORNEYS FOR:
Bank Applicant

2 COPY RECEIVED
DATE 2/2/78 at 11:00 AM
CURTIS, MALLETT - PREVOST,
COLT & LITTLE
ATTORNEYS FOR U.S. Trust
as Successor
of Federal Trust